

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 23, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP326-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 2011CF55**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHRISTOPHER J. WHITE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Christopher White appeals a judgment, entered upon his guilty pleas, convicting him of operating while intoxicated, fifth or sixth offense, and obstructing an officer. White also appeals the order denying his

motion for postconviction relief. White argues he is entitled to sentence modification or resentencing because the court sentenced him based on inaccurate information and the corrected information constitutes a new factor warranting sentence adjustment. We reject White's arguments and affirm the judgment and order.

### **BACKGROUND**

¶2 The State charged White with OWI and operating with a prohibited alcohol concentration, both counts as a fifth or sixth offense; operating after revocation; and obstructing an officer. Each charge was subject to a penalty enhancer based on White's status as a repeat offender. In exchange for his guilty pleas to the OWI and obstructing charges, the State agreed to dismiss and read in the operating after revocation charge and dismiss outright the operating with a prohibited alcohol concentration charge. The State also agreed to dismiss the penalty enhancers.

¶3 At sentencing, the court noted that the then thirty-six-year-old White had been involved with the criminal justice system for twenty-four years, "unabated except for times that [White] was locked up." After commenting that it did not know when it had seen a longer criminal record, the court expressed its doubt that White would ever be rehabilitated.

¶4 The sentencing court then noted that White received a concession from the State when it dropped the penalty enhancers. In mentioning this concession, the court mistakenly stated that the penalty enhancer for the OWI would have exposed White to an additional six years in prison when, in fact, White would have been exposed to an additional four years. In the context of acknowledging White's guilty pleas, the court again observed that White

benefitted from the plea agreement because the State got rid of “six years worth of confinement time.” When later noting that White was “absolutely not” a good risk, the court stated:

I almost wish I had those extra six years to give you, quite frankly, because I think this is what is going to be happening with you. You’re going to be in and out of prison for the rest of your life.

....

So I think the community does need protection from you. I think it’s just a matter of time before you kill somebody, and I’m going to make sure it doesn’t happen at least within the time frame that I have available.

¶5 The court ultimately imposed the maximum six-year sentence on the OWI conviction, consisting of three years’ initial confinement and three years’ extended supervision. With respect to the obstructing conviction, the court imposed a concurrent nine-month sentence. White moved for sentence modification, claiming he was sentenced based on inaccurate information. The court denied the motion, and this appeal follows.

### DISCUSSION

¶6 White argues he is entitled to resentencing because the court misstated how much additional time could have been imposed had the State not dismissed the OWI penalty enhancer. “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. *Id.* To be entitled to resentencing, White must show that the information was inaccurate and that the circuit court actually relied on the inaccurate information at sentencing. *Id.*, ¶26. “Whether the court actually relied

on the incorrect information at sentencing [is] based upon whether the court gave explicit attention or specific consideration to it, so that the misinformation formed the basis of the sentence.” *Id.*, ¶14. If the defendant meets his or her burden of showing that the sentencing court actually relied on inaccurate information, the burden shifts to the State to establish that the error was harmless. *Id.*, ¶3.

¶7 White argues that the inaccurate information influenced the court’s assessment of the gravity of the offense and contributed to its negative assessment of White’s character. In denying White’s motion, the court stated:

[Four years] is still a substantial concession. It wouldn’t have changed the sentence one bit. And fine, I made a comment that geez, I wish I had those years. Well, sometimes you make comments to people to attempt to change their later behavior with an understanding that, you know, the State was willing to reduce this some for you here. Yeah, you’ve gotten a break. You are back down to where we are on just a basic charge and hope that they’re not going to get involved in this kind of behavior again.

If I had truly wanted to sentence Mr. White to additional time, I would have made the other count consecutive; however, I made it concurrent so that I confined myself to the time that he had on [the OWI].

....

So I understand what you’re saying as far as the four years is concerned, but when you look at all the rest of the information that the Court considered in making the determination and all the various factors, this reference to getting a break is such a minor, minor part of this whole sentencing exercise that it’s not prejudicial at all to Mr. White.

The problems that he had were all of the things that the Court addressed ... starting with a 24-year criminal history when you’re only 36 years old. The Court spent a lot of time going through all the various factors. This was a minor factor. It would not have made a difference because in the Court’s mind, frankly, even a four-year reduction is a significant reduction in time. I think four years having to

spend in prison is a long time. And that's a significant break, of course, as well.

¶8 Even were we to assume the sentencing court “actually relied” on the misinformation, we conclude the State met its burden of proving the error was harmless. The court delineated several factors to support the sentence imposed, giving particular emphasis to White’s extensive criminal history and the related need to protect the community. The court properly acknowledged that the dismissed penalty enhancer was a concession under the plea agreement and noted that additional time might be appropriate because of the risk White presented to the community, not because of the specific amount of time that would have been available had the penalty enhancer remained. In this context, the difference between six and four years’ exposure was inconsequential. Additionally, the court did not utilize all of the time available because it made the nine-month sentence concurrent. Because the sentencing court’s reliance, if any, on the inaccurate information was harmless, it properly denied White’s resentencing motion.

¶9 White alternatively asserts that the corrected information regarding the OWI penalty enhancer constitutes a new factor warranting sentence modification. A circuit court may modify a defendant’s sentence upon a showing of a new factor. *See State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. *Id.*, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.* Second, the defendant must show that the new factor justifies sentence modification. *Id.*, ¶37.

¶10 A new factor is “a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was

unknowingly overlooked by all of the parties.” *Id.*, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *Id.*, ¶33. The determination of whether a new factor justifies sentence modification, however, is committed to the discretion of the circuit court. *Id.*

¶11 Here, the circuit court, in the proper exercise of its discretion determined it would have imposed the same sentence had it known the penalty enhancer exposed White to an additional four, rather than six, years. As recounted above, the court emphasized there were various factors that supported the sentence, and further noted that the dismissal of a four-year penalty enhancer was still a substantial concession that would not have altered its reasoning. The court, therefore, properly denied White’s alternative motion for sentence modification.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

